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STATEMENT BY SPECIAL DISTRICT ATTORNEY DANIEL M. DONOVAN, JR., CONCERNING THE INVESTIGATION INTO A MEMBER OF THE ASSEMBLY

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By letter dated August 24, 2012, Speaker Sheldon Silver notified Assembly Member Vito Lopez of the findings by the New York State Assembly Standing Committee on Ethics and Guidance of "multiple incidents of unwelcome physical conduct" he had inflicted on two members of his staff during June and July 2012, and the Committee's recommendation that Member Lopez be censured. In accordance with the Committee's recommendations, the Speaker publicly issued a letter of censure and admonishment to Assembly Member Vito Lopez on behalf of the Assembly, and removed him from his post as Chair of the Committee on Housing, stripped him of his seniority rights, reduced his staff allocation, directed that he not have any interns or employees under the age of 21 working in his office, and informed him that he and his staff would be receiving supplemental sexual harassment training. Shortly after the censure it was publicly revealed that there had been previous complaints by female employees working in Lopez's office, complaints which had resulted in a settlement being paid to the complainants both by Lopez personally and by the Assembly using state funds.

The Hon. Charles J. Hynes, District Attorney of Kings County, inquired of the Standing Committee whether any of the alleged incidents occurred within the confines of Brooklyn, and upon receiving an affirmative answer, sought an order relieving him of responsibility for investigating the

matter and assigning a Special District Attorney pursuant to County Law § 701. By Order dated August 31, 2012, the Deputy Chief Administration Judge for New York City Courts Fern A. Fisher assigned me as Special District Attorney to the matter, and by subsequent order dated September 7, 2012, clarified that the investigation was to include examination of allegations that in June and July 2012, Assembly Member Vito Lopez had subjected two female employees of the New York State Assembly to unwanted and unwelcome physical contact, possible improprieties in the disbursement of funds in June 2012 to settle previous complaints against Assembly Member Lopez by two other female staff members, and to prosecute any criminal charges arising out of these matters should such be advised. In addition, concurrent with my appointment, the Joint Commission on Public Ethics ("JCOPE") instituted an investigation into violations of the Public Officers Law arising out of the same conduct.

Upon my appointment as Special District Attorney, my Office conducted over 50 interviews, most of which were conducted jointly with JCOPE, and examined over 10,000 pages of documents to determine whether there was sufficient evidence to justify commencement of a criminal action in Kings County. That investigation has concluded. I am cognizant of my obligation to maintain confidences and the confidentiality of any investigation that I conduct. Nevertheless, in light of the public interest surrounding this matter, some discussion of the investigation and its fruits is unquestionably in order.

Part of that investigation was into allegations of unwanted sexual contact inflicted by Assembly Member Lopez on female members of his staff. Here it should be noted that not every instance of unwanted conduct of a sexual nature rises to the level of a crime under the Penal Law of New York. Certainly, what we found is alarming. However, based on our investigation, there is no basis upon which to conclude that a chargeable crime was committed within the confines of Kings County.

In addition, to satisfy Judge Fisher's directive that I examine possible improprieties with respect to the payment of public funds to settle the first two complaints in June 2012, my Office conducted numerous interviews of personnel in the New York State Assembly, the Office of the Attorney General, and the New York State Comptroller's Office. I concluded that the manner in which the settlement was reached and the payment was made did not implicate any criminal conduct; the payout by the Assembly followed the normal route by which employment claims are paid, and the contribution Assembly Member Lopez made to the settlement came from his personal funds. Nevertheless, it must be emphasized that the manner in which these entities dealt with the allegations fell short of what the public has the right to expect. In fact, had the subject matter of the settlement in June 2012 been promptly referred to the Assembly Standing Committee on Ethics and Guidance for investigation, or had the settlement not included a confidentiality clause, the incidents involving the second two complainants in June and July 2012 might have been avoided.

Many of the Assembly personnel interviewed, including the Speaker, agreed that a mediated settlement such as occurred here does not preclude an investigation by the Assembly Standing Committee on Ethics and Guidance. In fact, such investigation appears to be mandatory. The New York State Assembly Sexual Harassment Policy provides that a complaint against a Member of the Assembly "shall" be referred to the Ethics Committee for investigation. It does not burden the complainant with requesting such a referral be made and does not empower the complainant to ask that the referral not be made. Based on my investigation, the initial complainants regarded their revelations as sufficient to constitute a "complaint," and they were prepared to cooperate with an investigation. Throughout the mediation process and even after the settlement agreement had been reached, they continued to expect that such an investigation either was being conducted or would be conducted. Nevertheless, no referral of their complaints was made to the Standing Committee on Ethics and Guidance.

Instead, my investigation revealed that during the mediation and negotiation of a settlement, the chief concern of those in the Assembly was mitigating the Assembly's damages. That goal outweighed any interest in investigating or disciplining Assembly Member Lopez or in preventing similar occurrences in the future. The desire to shield the Assembly led to the negotiation of a settlement agreement contingent on a confidentiality provision, one crafted at the request not of the complainants but of Assembly Member Lopez. By that confidentiality clause, the complainants were prohibited from "discuss[ing] or mak[ing] any statement of any sort concerning the underlying circumstances of the dispute which has given rise to this Agreement or any terms of this Agreement with any other person or entity," and further prohibited them from making "any disparaging remarks, comments or statement in any form concerning any aspect, circumstance or incident involving their employment" in Vito Lopez's New York State office or other New York State Assembly offices. Breach of this provision entitled the "Employer" (the Assembly) to $10,000 in liquidated damages.

The Assembly negotiated that settlement agreement with the complainants almost independently of any other agency's oversight, and Speaker Silver has since publicly acknowledged that it was a mistake to approve the privately negotiated settlement and its confidentiality clause. See Danny Hakim, Michael M. Grynbaum, and William K. Rashbaum, *Assembly Leader Admits Fault as Critics Assail Secret Payoff*, NY Times, August 28, 2012. As a general matter, the Office of the Attorney General disapproves of confidentiality clauses in settlement agreements by state agencies as against public policy. And, surely, the public interest against a confidentiality clause could not be stronger than in the present case, one involving misconduct by an elected official. Yet neither the Office of the Attorney General nor the State Comptroller's Office, agencies with knowledge of the settlement agreement and the secret payout, raised any objection to inclusion of such a confidentiality clause. Their input, our investigation revealed, was limited by the

longstanding policies of those offices which predate the current administrations, and which were strictly adhered to in this case at the expense of the public interest.

First, those providing legal advice from the Office of the Attorney General, including, primarily, an expert on employment law (see Statement by James Freedland, Director of Communications for the Office of the Attorney General, dated August 30, 2012), adopted an arm's length approach, in keeping with the general rule of that Office that it should not become overly involved at the prelitigation stage for fear that its ability to defend a lawsuit might be compromised by a conflict of interest. In keeping with that policy of noninvolvement, the Office of the Attorney General provided advice to the Assembly in only "hypothetical" terms and did not review the settlement agreement in more than a "cursory" manner. But of course, an attorney should act not as a mere legal technician but as a true counselor to those who seek legal advice. That counselor function is most crucial during the prelitigation phase, before filing of court process, when sound advice may be acted on. Had the Attorney General's Office acted as an attorney and counselor at law, and allowed itself to become truly engaged in the process, it could have advised against inclusion of the confidentiality clause as being contrary to public policy.

Similarly, the limited analysis conducted by the State Comptroller when making payments for settled claims is to ask merely whether a legal debt exists, whether the amount requested is the correct one, and whether the payment is being made to the right person. At no time does the State Comptroller make independent inquiries into the legitimacy of a claim or the propriety of a payment. Worse, because of the limits of the computer software used to track payments, there is no mechanism in place for the Comptroller's Office to record the nature or true purpose of a payment. Thus, in this matter, upon the finalization of the settlement agreement, the New York State Comptroller's Office issued a check to the complainants' attorney, designated merely as payment for "legal services."

Unsurprisingly, resolving the complaints in this secretive manner and requiring a confidentiality clause edited by Assembly Member Lopez apparently encouraged him to continue the inappropriate conduct. While the settlement was being negotiated, the second two complainants began working for Assembly Member Vito Lopez in his Brooklyn offices, and were quickly subjected to conduct similar to that which was the subject of the settlement.

Clearly, the Assembly's Sexual Harassment Policy is a sound one, particularly as it provides for mandatory referral of any sexual harassment complaints against a Member to the Standing Committee for immediate investigation and, in appropriate cases, sanctions. But that Policy, promulgated by the Speaker in accordance with the Rules of the Assembly, is a nullity if it can be so easily ignored in the face of a complaint against a Member, especially one deemed credible enough to warrant payment of a settlement. This case, thus, represents the very harm that the Policy, with its requirement of mandatory referrals, was designed to prevent. It is crucial that the ignoring of the Assembly's Sexual Harassment Policy not be repeated, an ideal made more difficult by the fact that, currently, there are no consequences for the Assembly not following its own Policy.

Furthermore, the Office of the Attorney General should consider adopting a role as the attorney to state agencies in which it acts not only as a litigator but as a true counselor at law. The Office should dispense with the longstanding policy which prevents in-depth discussion of prelitigation matters and provision of substantive advice. More particularly, when asked to review settlement agreements, the Office of the Attorney General should counsel against any settlement agreement that is wholly contrary to public policy, those which include confidentiality clauses protecting the malfeasance of elected politicians, and liquidation clauses that punish disclosure of the names of parties involved in a dispute.

Moreover, in order to safeguard the public fisc, promote governmental transparency, and avoid even the appearance of impropriety, the Office of the State Comptroller should be prepared to

conduct its own independent review the moment a state agency or the Office of the Attorney General is contemplating a monetary settlement in a employment dispute, be it a settlement in a pre-litigation scenario or after the commencement of a lawsuit against the state. When conducting its review, there should be no presumption of propriety for legal settlements agreed to by state agencies; rather, the Office of the State Comptroller should demand supporting documentation from the agency and the Attorney General, and the Office of the State Comptroller should have lawyers or claims specialists capable of conducting their own analysis of the underlying facts and applicable laws, and capable of assessing the potential liability of the state should such claims be litigated.

In addition, when making payments, the Office of the State Comptroller must improve its data and information management system in order to accurately classify payments made on behalf of the state. The public has the right to know how the public fisc is being spent, and the classification of a legal settlement on behalf of an elected official should never be confidential or generically classified as one for "legal services." By improving its software and information management system, the Office of the State Comptroller would be better prepared to track the types of claims it pays out, and provide rapid disclosure to the public in the event of a request for information made pursuant to the Freedom of Information Law, to avoid this type of situation in the future.

The Richmond County District Attorney's Office, acting as Special District Attorney, would like to thank those individuals who cooperated with our investigation.